United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

675-676
ORIGINAL

76-6199
77-4176

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL MOTORS CORPORATION, A Corporation of the State of Delaware,
Plaintiff-Appellee,

—against—

THE LONG ISLAND RAIL ROAD COMPANY, A Corporation of the State of New York,
Defendant-Appellant.

THE LONG ISLAND RAIL ROAD COMPANY,
Third Party Plaintiff-Appellant,

—against—

THE UNITED STATES OF AMERICA and THE INTERSATE COMMERCE COMMISSION,
Third Party Defendants-Appellees,

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
Intervening Third Party Defendant-Appellee.

On Appeal From The United States District Court For The Eastern District Of New York.

(Additional titles appear on reverse side of this cover)

BRIEF OF DEFENDANT-APPELLANT-PETITIONER, THE LONG ISLAND RAIL ROAD COMPANY

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THE LONG ISLAND RAIL ROAD COMPANY,
Appellant,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The Interstate Commerce Commission.

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER, THE LONG ISLAND RAIL ROAD COMPANY

Preliminary Statement

By Decision and Order of the Honorable Jacob C. Mishler, Chief United States District Judge, Eastern District of New York, dated November 19, 1976, and filed and entered in the Office of the Clerk of the Court on November 22, 1976, Defendant-Appellant, The Long Island Rail Road Company (hereinafter LIRR) was permanently enjoined and restrained from suspending service to the private sidetrack of Plaintiff-Appellee, General Motors Corporation (herein GM), at Bethpage, New York, because of GM's refusal to assume the maintenance cost of the switch connection (482a).[1] The Court's decision adopted the ruling of the ICC to the effect that LIRR could not require GM to sign its standard sidetrack agreement, previously signed by 169 other shippers, but must publish any maintenance change in a separate tariff. By Notice of Appeal dated December 15, 1976, the LIRR appealed from the aforesaid Decision and Order of Judge Mishler (500a) and subsequently moved this Court to defer the filing of the Briefs and Appendix pending an administratively final decision by the Interstate Commerce Commission (hereinafter ICC) on a related proceeding involving the same parties. The LIRR's motion was granted and the appeal was held in abeyance pending the final decision by the ICC in Docket No. 36516, *Switch Connection Charge at Bethpage, N.Y., Long Island Railroad.*

On December 14, 1976, the LIRR filed its Freight Tariff No. 72 to become effective January 15, 1977, to impose a per car charge of $4.39 on each freight car delivered on the private siding of GM at Bethpage, N.Y. to cover the cost of maintaining the switch connection. Under date of

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[1] Reference to appendix page.

January 12, 1977, GM filed with the ICC a Protest and Petition for Suspension of LIRR's Freight Tariff No. 72 along with a Verified Complaint (509a). While refusing to suspend the tariff, the ICC instituted an investigation by Order filed January 28, 1976 (571a), which Order, *inter alia,* required the LIRR to keep account of all amounts received pursuant to Freight Tariff No. 72 so that if the tariff was subsequently found unlawful, appropriate refunds could be required. The proceeding was subsequently assigned for handling under modified procedure (572a) and after LIRR and GM filed their various Statements of Fact and Argument in February and April of 1977, the ICC, Division 2, issued a Report and Order dated August 26, 1977, and served September 7, 1977, finding that the switch maintenance charge in Freight Tariff No. 72 was not shown to be lawful and directing the LIRR to cancel the tariff within 35 days of the service date of the Order and to make appropriate refunds (785a). By Petition to the ICC dated October 4, 1977, the LIRR requested that the effective date of the aforesaid Report and Order be stayed pending judicial review (801a), which Petition for a stay was denied by the ICC under date of October 13, 1977, because of the alleged injury to GMC (807a).

The Petition for Judicial Review of the ICC's Report and Order dated August 26, 1977, was filed and served October 5, 1977, and the LIRR's motion to consolidate the Appeal from Judge Mishler's Decision (76-6199) with the Petition for Judicial Review of the ICC's Report and Order in Docket No. 36516 (77-4176) was granted by the Order of this Court dated October 17, 1977.

Prior Proceedings

Case No. 76-6199

Following the refusal of GM to execute the LIRR's standard private siding agreement, the LIRR advised GM it would place out of service GM's private siding at Bethpage, N.Y. on November 15, 1972 (40a). GM on November 14, 1977, commenced an action in the United States District Court for the Eastern District of New York (Civil Action No. 72-C-1549) and obtained an Order to Show Why a Preliminary Injunction Should Not Be Issued and a Stay Prohibiting the LIRR from terminating service to GM's private siding until the Order to Show Cause was heard (5a). On December 7, 1972, the return date of the Order to Show Cause, upon consent, the Court extended the Restraining Order against the LIRR while GM and LIRR submitted a Joint Petition to the ICC for a Declaratory Order (15a). Accordingly, a Joint Petition was filed with the ICC (43a) following which the parties submitted Statements of Fact and Argument to the ICC (55a for LIRR; 129a for GM). The National Industrial Traffic League (hereinafter NIT) was permitted by the ICC to intervene and it also filed a Statement of Fact and Argument with the ICC (172a).

Under date of May 21, 1974, the ICC served an Initial Decision by its Administrative Law Judge Richard S. Ries (224a), which, *inter alia,* found that the LIRR could not lawfully stop servicing GM's private siding because of the refusal of GM to sign an agreement whereby it assumed the cost of maintaining the switch connection. The LIRR duly filed with the ICC its Exceptions to the aforesaid Initial Decision of A. L. J. Ries (233a) to which Replies were filed by both GM (250a) and NIT (278a). Under date of June 10, 1975, the ICC, Division 3, issued a Decision and Order affirming the findings and Initial Decision

of A. L. J. Ries (285a) with Commissioner O'Neal dissenting (286a). The LIRR, thereupon, petitioned the ICC to reconsider the June 10, 1975, Decision and Order of Division 3 (293a) and by Decision dated February 3, 1976, the ICC, Division 3 acting as an Appellate Division, affirmed its prior Decision of June 10, 1975 (302a).

The LIRR, thereupon, in Civil Action No. 72 C 1549, filed and served a Third-Party Summons and Complaint against the United States of America and the ICC so as to make them parties in the action pending before the United States District Court of the Eastern District of New York (311a). Upon application, NIT was permitted by the Court to intervene in the action (319a). Answers were duly filed on behalf of the ICC (321a), the U.S.A. (324a), and NIT (326a), following which the various parties filed Briefs with the Court (329a-447a). On September 17, 1976, oral argument was heard by the Honorable Jacob Mishler, Chief United States District Judge for the Eastern District of New York (448a-481a). Under date of November 19, 1976, Judge Mishler issued a Decision and Order permanently enjoining the LIRR from not serving GM's private siding and from this Decision and Order the instant appeal was taken.

Case No. 77-4176

Based upon a finding by Judge Mishler that the LIRR had not demonstrated that the line-haul rate failed to compensate it for its switch maintenance charge (488a-491a) and the representation to the Court by the ICC that the proper way for LIRR to recover such costs if the line-haul rate was inadequate was to file a tariff imposing a separate maintenance charge (423a), the LIRR filed with the ICC its Freight Tariff No. 72 to be effective January 6, 1977 (520a-521a). Concurrently, the LIRR moved this Court

for an Order deferring the filing of the Briefs and Appendix in Case No. 76-6199 and otherwise holding the Appeal in abeyance pending the outcome of any proceeding before the ICC involving Freight Tariff No. 72. By Order dated February 3, 1977, the Court granted LIRR's motion and deferred the filing of Briefs and the Joint Appendix until 30 days after a final Decision and Order was issued by the ICC in Docket No. 36516, *Switch Connection Charge at Bethpage, N.Y.—Long Island Railroad.*

While the ICC refused to suspend LIRR's Freight Tariff No. 72 at the request of GM, it did institute an investigative proceeding into its lawfulness under Docket No. 36516 by Order dated January 26, 1977 (571a). As hereinbefore indicated[2] during February and April, 1977, both LIRR and GM filed Statements of Fact and Argument with the ICC in accordance with ICC modified procedure (573a-783a). Under date of April 28, 1977, the ICC in accordance with the requirements of Section 1(5)(b) of the Interstate Commerce Act[3] as added by Section 202 of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210) found that LIRR had market dominance for the movements to which Freight Tariff No. 72 applied (784a). By Report and Order dated August 26, 1977, and served September 7, 1977, (785a) the ICC, Division 2, found (797a), that the line-haul rates failed to cover even the variable costs of the involved traffic but held that the LIRR had failed to show that the proposed maintenance charge was just and reasonable since it had not used actual construction costs but had used current replacement costs (798a). The Report and Order of August 26, 1977, went on to direct

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[2] *Supra,* page 3.

[3] 49 U.S.C. §1(5)(b).

the LIRR to cancel its tariff within 35 days of the service date and to refund the charges collected under the tariff (799a). On October 4, 1977, the LIRR petitioned the ICC for a stay of the effective date of the Order pending judicial review by this Court (801a) and on October 5, 1977, filed with this Court its Petition for Judicial Review of the August 26, 1977, Decision and Order of the ICC. By Order dated October 14, 1977, the ICC denied the LIRR's Petition for a stay on the grounds that the irreparable harm to the LIRR was unclear while GM would be injured by being deprived of the use of the amounts collected (807a-808a).

Statement of Issues Presented

1. Did the Court below misinterpret Section 1(9) of the Interstate Commerce Act?
2. Was prejudicial error committed by the Court below and/or the ICC in refusing, contrary to the clear language and intent of Section 1(9) of the Interstate Commerce Act, to allow the LIRR to recover the maintenance costs of the switch connection to the GM private siding?

Statement of Facts

Prior to 1954, the LIRR required all industries located on its line to bear the entire cost of maintaining private sidings and switch connections, even though portions thereof were on railroad property. In late 1954, in order to meet the increasing competition from other modes of transportation, the LIRR changed its policy and assumed the burden of maintaining the switch connections and those portions of the sidings which lay within the limits of its

right-of-way (75a). Subsequently, in September 1970, the LIRR was forced to revert to its prior policy because of its soaring deficits, and by 1972 had renegotiated, without a single refusal, some 169 sidetrack agreements out of a total of 278 to conform to the new policy (75a).

In late 1965, at the request of GM, the private siding and switch connection to GM's plant at Bethpage, N.Y., was constructed and placed in service. However, when LIRR changed its policy in 1970, GM refused to sign the standard agreement submitted to it which would require GM to reimburse LIRR for such actual costs of maintenance as were incurred by LIRR (70a-74a) on the same basis as the agreements signed by the other shippers.

During the period 1966 through 1972, the annual deficits of the LIRR from freight service alone went from $4,868,417 to $11,461,373, an increase of almost 150 percent. During the same period, there was little or no increase in freight revenues and 1972, when compared with 1966, showed an actual decline in both freight revenues and total revenues from freight service (123a). With the freight expense more than double the total freight service revenues, it was obvious that the LIRR was not being reimbursed from the line-haul rates for the cost of maintaining the GM switch. A further study of 1976 GM traffic to Bethpage, N.Y., showed that the revenue generated therefrom failed to cover full costs and even failed to meet the variable costs of handling the traffic by a substantial margin (583a-596a). In 1972, LIRR's average annual cost of maintaining a switch such as the GM private siding switch was $2,908, and the average annual cost of maintaining private siding trackage on railroad property was $0.92 per linear foot, which in the case of the 390 linear feet of track on LIRR property for the GM siding would total $358 (75a-76a). The total cost of maintenance and depreciation as of 1976 for the GM

switch connection and trackage on railroad property was estimated at $1,808 (610a-611a).

Because of GM's refusal to sign LIRR's standard sidetrack agreement, LIRR notified GM that effective November 15, 1972, it would put the track out of service and would no longer serve the siding (40a-41a). GM then commenced the instant action before the United States District Court for the Eastern District of New York.

Summary of Argument

Since Section 1(9) of the Interstate Commerce Act clearly states and intends that a railroad is entitled to reasonable compensation for the construction and maintenance of a private siding switch connection, it was clearly error by the Court below and the ICC, in the face of LIRR's horrendous freight deficits, to prevent it from requiring GM, like other shippers, to bear the cost of maintaining the switch connection as a condition for further service over the switch connection. The standard sidetrack agreement, previously signed by 169 other shippers but which GM refused to sign, required GM only to repay the railroad for actual work performed on the switch connection and siding trackage located on railroad property and thus cannot be considered to be anything but just, reasonable and nondiscriminatory.

After specifically finding that the line-haul freight rates on GM traffic to Bethpage did not come close to meeting even the variable costs of handling the traffic, it was arbitrary, improper and prejudicial error for the ICC to require the cancellation of LIRR's Freight Tariff No. 72 because the charge was based upon estimated costs instead of actual past costs.

ARGUMENT

POINT I

The Court below and the ICC misinterpreted Section 1(9) of the Interstate Commerce Act.

The applicable language of Section 1(9) of the Interstate Commerce Act (49 USC §1(9)) reads as follows:

> Any common carrier . . . upon application of . . . any shipper . . . shall construct, maintain and operate *upon reasonable terms* a switch connection with any . . . private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same . . . if any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper . . ., such shipper . . . may make complaint to the Commission, as provided in Section 13 of this title, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification *and reasonable compensation* therefor . . . (emphasis added)

The plain language of the statute contemplates that a carrier can and should be compensated for the cost of maintaining a switch connection to a private sidetrack. The Commission has on other occasions recognized the right of a railroad to obtain such compensation by means of appropriate agreements. *Merchants Refrigerating Co.*

v. *N.Y. Central*, 238 ICC 559; *Allied Container Corp.* v. *Maine Central RR*,[4] Docket No. 36143.

The Court below, however, indicated in its Decision that the LIRR could only recoup its maintenance costs by an increase in the line-haul rates or a separate reasonable maintenance charge (491a). In regard to this last aspect, the Court, in a footnote, although declining to rule specifically on the issue, indicated that the proper way for a carrier to levy the separate maintainence charge would be by the filing of a tariff.[5] This apparently was based upon the representations of counsel for the Commission at the oral argument before the Court below when he advised the Court that the LIRR, if it felt the line-haul rate was inadequate, should file a tariff setting up a separate charge (471a-472a).

The statute clearly contemplates and intends allowing a carrier to require shippers desiring private sidetrack service to enter into a reasonable agreement and that one of the terms of such an agreement could be compensation for the maintenance of the switch connection. Nothing in the act suggests that a carrier is relegated to recovering its maintenance costs from the line-haul rate or by a separate tariff charge and the ICC has recognized this in both the *Merchants Refrigerating Co.* case, *supra,* and the *Allied Container Corp.* case, *supra.* It is only in the case of the LIRR that the ICC refuses to concede its right to obtain maintenance reimbursement by way of the standard private siding agreement.

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[4] This ICC proceeding has never been officially reported. A copy of the Decision and Order of Division 3 is annexed hereto as Addendum A. The Initial Decision of Administrative Law Judge Dolan will be found at 425a of the Joint Appendix.

[5] While the Appeal in 76-6199 was being held in abeyance, the LIRR did exactly this with the result that the Appeal in 77-4176 is also before this Court on a consolidated basis.

POINT II

The Court below and the ICC committed prejudicial error in refusing to allow the LIRR to recover the maintenance costs of the switch connection to the GM private siding.

In Case No. 76-6199, both the Court below and the ICC brushed aside the higher freight deficits of the LIRR and held that the LIRR had not sustained its burden of showing that the line-haul rates did not compensate it for the maintenance costs of the switch connection to the GM private siding at Bethpage. In Case No. 77-4176, the ICC, after holding that the LIRR had clearly demonstrated that the line-haul rates did not compensate it for such maintenance costs, ordered the cancellation of LIRR's Freight Tariff No. 72 on the grounds that the per-car charge contained therein had not been shown to be reasonable, since it was based upon estimated costs and not actual past costs (798a).

Unfortunately, the records of the LIRR did not permit it to pinpoint the exact past costs of maintaining the switch connection to GM's private siding. If LIRR had been permitted by the Court below and the ICC to have required GM to execute the standard sidetrack agreement, there would have been no problem, since bills would be rendered only when and if work was actually performed and no estimates would be required.

In any event, the cavalier nature of the treatment accorded LIRR's horrendous freight deficit by the Court below and the ICC in Case No. 76-6199 was amply demonstrated in Case No. 77-4176 by the evidence before and the finding of the ICC that the line-haul rates failed to cover by a wide margin even the variable costs involved in handling the GM traffic. The ICC's complete lack of

concern about LIRR's desperate financial problems was not only demonstrated by its ordering Freight Tariff No. 72 to be cancelled without any determination of what would be a permissible reasonable charge but was amplified by the ICC's refusal to stay the cancellation pending this appeal. The ICC refused to grant a stay on the grounds that the injury to LIRR was unclear and that GM would be deprived of the use of the amounts collected (807a), thus ignoring the fact pointed out by LIRR that if, on appeal, it prevailed, the LIRR would be unable to go back and recover the amounts it would have been able to collect if the stay had been granted, whereas GM would have a right of a refund with interest should it prevail (804a-805a).

In adopting the ICC's original decision, the Court stated that "the issue before the ICC was whether the LIRR was receiving reasonable compensation for its maintenance of the switch connection" and ruled "the ICC decision as to the adequacy of compensation is supported by substantial evidence" (488a). In the second case, the ICC finally admitted the fact that the line-haul rates failed to compensate the LIRR adequately, but still refused to allow LIRR to recover the maintenance costs.

Clearly, in the face of the overwhelming evidence of LIRR's freight deficits, the Court below in Case No. 76-6199 and the ICC in Case No. 77-4176 should have allowed the LIRR to utilize the same means used by the Maine Central Railroad in the *Allied Container Corp.* case, *supra,* and the New York Central Railroad in the *Merchants Refrigerating Co.* case, *supra,* by requiring, through the medium of the standard sidetrack agreement, GM to pay the actual costs of maintenance as incurred and billed.

CONCLUSION

In Case No. 76-6199, the Decision and Order of the Court below should be reversed and remanded with directions to refuse to enjoin the LIRR from declining to serve GM's private siding unless and until GM signs LIRR's standard sidetrack agreement under which GM will reimburse LIRR for actual maintenance costs when and as incurred and billed. In the alternative, this Court should set aside, annul and vacate the August 26, 1977 Report and Order of the ICC, directing the cancellation of LIRR's Freight Tariff No. 72.

Respectfully submitted,

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ADDENDUM A

Decision and Order of Division 3 of the Interstate Commerce Commission

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 27th day of October, 1976.

No. 36143

ALLIED CONTAINER CORPORATION

v.

MAINE CENTRAL RAILROAD COMPANY

Upon consideration of the complaint and record in the above-captioned proceeding, including the initial decision of the Administrative Law Judge served on April 29, 1976; the exceptions thereto filed by complainant on June 1, 1976; and the reply thereto filed by defendants on June 17, 1976; and

It appearing, That the Administrative Law Judge found that complainant failed to establish that defendant's customary practice of requiring a shipper on a private sidetrack to bear the cost of construction and maintenance of private sidetracks including switch connections and spurs on lead tracks, was unjust and unreasonable or in violation of sections 1(3), (4), (6) or (9) of the act;

Addendum A

It further appearing, That the complainant excepts to the Administrative Law Judge's finding that defendant's customary practice, as affecting complainant, did not violate sections 1(9) and 1(6) of the act, and to the findings that defendant has consistently required the same contractual terms of its other patrons served from private sidings and that defendant has never absorbed into its line-haul rates the construction and maintenance costs of switch connection facilities to private sidetracks;

It further appearing, That the Administrative Law Judge did not err in his finding of no violation of sections 1(9) and 1(6) of the act because: defendant's right to reasonable compensation for the cost of constructing and maintaining a switch connection facility to a private sidetrack arises under section 1(9); the practice of charging patrons separately, as is customary with defendant, rather than absorbing such costs into line-haul rates, may be a reasonable method of compensation under 1(9), *General Motors Corp., Long I.R. Priv. Sidetrack,* 351 I.C.C. 691; in light of defendant's longstanding and uniformly applied practice of separately charging its patrons and never absorbing such costs, defendant's compensation is reasonable under section 1(9); the specific and comprehensive coverage of private switch connections in section 1(9) precludes reliance upon section 1(6) as the source of an obligation to provide private delivery systems as part of the general transportation facility;

It further appearing, That the record contained sufficient, unrebutted evidence in the form of statements by defendant's witnesses concerning the questioned practices to support the Administrative Law Judge's findings of uniform treatment and segregation of costs;

And it further appearing, That the exceptions do not show any material errors in the Administrative Law

Addendum A

Judge's statement and evaluation of the facts, conclusions of law, or findings; do not raise any material matters of fact or law not adequately considered and properly disposed of in his initial decision; and are not of such a nature as to require the issuance of a report by Division 3 discussing the evidence and the arguments advanced in light of the exceptions;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in light of the exceptions and the reply thereto does not warrant a result different from that reached by the Administrative Law Judge, and that the statement of facts, conclusions, and findings of the Administrative Law Judge, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own;

It is ordered, That the complaint filed in this proceeding be, and it is hereby, dismissed;

By the Commission, Division 3, Commissioners. BROWN, MACFARLAND, and CLAPP.

ROBERT L. OSWALD
Secretary

(SEAL)

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William Finch

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this 4th day of January , 1978.

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